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No. 89-1290

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

ROBERT R. FREEMAN, ET AL.,

Petitioners,

v.

WILLIE EUGENE PITTS, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF INTERVENORS IN *CARLIN V. BOARD OF EDUCATION SAN DIEGO UNIFIED SCHOOL DISTRICT* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF INTERVENORS
IN *CARLIN V. BOARD OF EDUCATION*
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS

FOR REVERSAL

INTEREST OF *AMICI CURIAE**

Amici Curiae are Intervenors--opposing mandatory racial assignments--in the school desegregation case entitled *Carlin, et al.*, Plaintiffs, *v. Board of Education, San Diego Unified School District,* Defendant; *Groundswell, et al.*, Intervenors, No. 303800, Superior Court, San Diego County, California. This Court may take judicial notice of proceedings in the "Carlin" case.

The *Carlin* complaint, based upon *stare decisis* application of judicial decisions, was filed December 4, 1967, as a class action by certain black students, among others, versus the Defendant Board of Education to "integrat ' the San Diego Unified School District. The Order Determining Existence of Class Action, filed December 7, 1973, described the class as--

> "All students attending the San Diego Unified School District and their parents and legal guardians who believe that said schools should be racially balanced, if necessary through court order."

On October 21, 1980, a busing plan was proposed to the Defendant Board (Appendix, p.2A). *Amici*--including an association of persons called "Groundswell," and some individual students and their parents--intervened on December 15, 1980. They alleged in their complaint in intervention (pp. 8-10) that it was unconstitutional to assign the six intervening students and other students similarly situated, because of their race, to particular schools.

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*This brief is filed with the consent of the parties; letters consenting to the filing of this brief have been lodged with the Clerk.

Amici later offered proof of signed petitions by 1856 District students, each "object(ing) to school authorities making me, because of my race, go away from my neighborhood public school location to classes, without my consent and the consent of my parents, as a violation of my rights." Their existence was established and an excerpt from an exemplar, marked as a part of *Carlin* Intervenors' Exhibit 6 for Identification only, is annexed as Appendix A. Excerpts from said Exhibit 6 and *Carlin* reporter's transcript of procedings, dated July 16, 1981, are annexed as Appendix B.

In 1982, an amendment to the California Constitution, Section 7A, Article I, in effect prohibiting California courts from issuing busing orders without the basis required by this Court, was upheld in *Crawford v. Los Angeles Board of Education,* 458 U.S. 527.

Although the *Carlin* Court has filed an "Order re Integration Plan/Final Order" on May 21, 1985, which permits neighborhood school assignments, it has retained continuing jurisdiction (p.12). Thus, those having the status of *Amici* students remain subject to renewal of the contention that racial imbalance through causes not attributable to them call for their being racially reassigned beyond their neighborhood schools.

Here, the DSCC has complied with desegregation orders since June 12, 1969, as to student assignments under a neighborhood plan, to the satisfaction of the district court, which on June 30, 1988, dismissed the DSCC from court supervision as to such assignments. See history in *Pitts by Pitts v. Freeman.* 887 F.2d 1438, 1444 (11th Cir. 1989). Upon appeal from that ruling, the Court of Appeals panel ordered that the DCSS and the district court "must consider busing--regardless of whether the plaintiffs support such a proposal." Id. at 1450.

Amici submit that the present racial imbalance cited by the panel (Id. at 1441) in some schools of the DSCC, which the panel terms "segregation" notwithstanding free transfer provisions, is caused by population changes (see Id. at 1442) and not by any discriminatory action by the DSCC, particularly since June, 1969. Therefore, the panel busing order lacks the

basis required by *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 28 (1971).

Amici have a strong interest in seeing that a busing order based upon what is at most *de facto* "segregation" is not issued, which could be used as a precedent elsewhere to racially reassign voiceless students after they have been able to attend their neighborhood schools for years.

SUMMARY OF ARGUMENT

The DeKalb County School System (DCSS) in Georgia has been operating under the direction of the district court since June 12, 1969, in this school desegregation case brought earlier by a black plaintiff class. At that time the trial court, among other things, enjoined the defendant DCSS from discriminating on the basis of race, and ordered the DCSS to close all remaining de jure black schools and to establish a neighborhood school attendance policy. *Pitts by Pitts,* supra, 887 F.2d at 1443.

DCSS then "closed all de jure black schools," and, it appears from the litigation history related in the panel decision, established a neighborhood school attendance policy, and a "M to M program." The latter program permits students to transfer from schools in which their race is a majority to schools in which their race is a minority, which was modified in 1976 to provide those students with free transportation. Id. at 1443.

The history relates a series of requests by the parties and orders leading to the reversal in 1985 in "Pitts I, 775 F.2d 1423" by the Eleventh Circuit of a district court conclusion that the DCSS had achieved unitary status. Id. at 1443. More litigation followed, leading to a June 30, 1988, district court decision, from which both parties appealed. Id. at 1444.

The plaintiffs contended to the appellate court panel, among other things, that the "district court erroneously dismissed the DCSS from court supervision in the area of student assignment." The DCSS contended, among other things, that it "satisfied its duties relating to student assignment

when it complied with the district court's 1969 order and closed all de jure black schools." The DCSS "takes the position that it did not 'cause' resegregation and that it possesses no duty to take affirmative action to desegregate." Id. at 1444.

The panel order acknowledges that demographic changes affected the DCSS after 1969. Id. at 1442. It relates (Id. at 1441) the current racial imbalance in the DCSS, which Amici submit was caused by demographic changes and not by the DCSS, which the district court has found has complied with its 1969 order in the area of student assignment. Nevertheless, the panel has issued the following far-reaching order:

> "...The DCSS must consider pairing and clustering of schools, drastic gerrymandering of school zones, and grade reorganization. See *Swann*, 402 U.S. at 27-28... The DCSS and the district court must consider busing--regardless of whether the plaintiffs support such a proposal. The DCSS's neighborhood plan is not inviolable..." Id. at 1450.

By its very wording, the order concedes extensive support by students throughout the DCSS for a neighborhood system, and, by implication, opposition to "forced" busing. The trial court is ordered, without any provision for objecting students to be heard, to fashion a plan to reassign them beyond their neighborhood schools on a racial basis.

Swann, 402 U.S. at 28, states that "(a)bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." Demographic changes, and not DSCC actions, after 1969 caused what is at most *de facto* "segregation," which is not a sufficient basis for the busing order.

The order to racially bus students is, therefore, of a legislative nature beyond the panel's authority. It also fails to provide for hearing the objections of students upon whom it now focuses. Thus, it is in violation of the separation of powers and the due process provisions of the United States Constitution.

ARGUMENT

I. BACKGROUND: DESEGREGATION CASES ARE UNIQUE

A United States Court of Appeals three-judge panel for the Eleventh Circuit has ruled:

> "(T)hat a school system does not achieve unitary status until it maintains at least three years of racial equality in six categories: student assignment, faculty, staff, transportation, extracurricular activities, and facilities. The DCSS has not achieved unitary status. We affirm the district court's conclusion that the DCSS failed to fulfill its duties in the areas of faculty and staff. We reverse the district court's conclusion that the DCSS fulfilled its duties in the area of student assignment. Accordingly, we order the district court to require the DCSS to prepare and file a plan in accordance with this opinion in the shortest reasonable time." *Pitts by Pitts*, supra, 887 F.2d at 1450.

To meet the terms of the panel order, *Amici* believe the trial court will have to order the petitioning school authorities to indefinitely reassign nonconsenting students, solely on a racial basis, beyond their neighborhood schools to achieve an unspecified racial balance in the schools satisfactory to the appellate panel. The basis required by *Swann* for such an order has not been shown.

A. Amici Curiae's Presentation is Appropriate

The affirmative relief ordered by the panel adversely affects nonconsenting students in the DCSS, and, by virtue of the *stare decisis* doctrine, others like the "anti-busing" students in San Diego. *Amici's* presentation is in the tradition of those in cases having serious implications for nonparties. Compare *amicus* presentation in *Bob Jones University v. United States*, 461 U.S. 574 (1983).

Contentions by *amici curiae*, with implications for nonparty students, have been considered in desegregation cases.

A key pronouncement in the seminal California case of *Jackson v. Pasadena City School Dist.*, 59 Cal.2d 876, at 881, rendered June 27, 1963, pertained to school district responsibility for affirmative integration in schools other than the defendant Pasadena district:

> "The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause."

Footnote 5 in Note, 51 Cal.L.Rev. 810 (1963) points out that the complaint in *Jackson,* supra, --

> "was drawn on the theory of affirmative segregation and in the intermediate appellate court, counsel for plaintiff expressly denied that he was advocating affirmative integration. 210 A.C.A. at 658, 16 Cal.Rptr. at 665. The question was not argued in the briefs of either party. Affirmative integration was urged, however, in two *amici curiae* briefs."

This dictum, under the *stare decisis* doctrine, became the basis of the decision in 1976 in *Crawford v. Board of Education*, 17 Cal.3d 280, which decreed affirmative integration (which continues in effect except as to "busing") in California without the showing of *de jure* segregation required by federal decisions. The "busing" authorized by *Crawford* was disallowed by the 1979 "anti-busing" amendment to Section 7A, Article I, of the California Constitution, ultimately upheld in *Crawford,* supra, 458 U.S. 527 (1982).

Amici's contentions, like those of the *amici* in *Jackson* and *Bob Jones University*, supra, may be entertained favorably.

B. History Leading to the *Swann* Doctrine

In 1896, the United States Supreme Court held in *Plessy v. Ferguson*, 163 U.S. 537, that the segregation of the races in transportation facilities did not violate the Constitution so long as

the facilities were equal. The majority opinion rationalized that any discrimination felt by black persons assigned to separate facilities, since they were equal to those used by whites, was "not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." 163 U.S. at 551.

Justice John Marshall Harlan (I) vigorously dissented, and his rationale is summarized by Professor Bernard Schwartz in *The Supreme Court* (Ronald Press, 1957) at page 269:

> "Yet, even if the *Plessy* Court were correct in its assumption that segregation is not discrimination, that would not make its doctrine consistent with the equal protection clause. For that clause bars the states from making legal distinctions that are not supported by reasonable legislative classifications, and, as already emphasized, classification on the basis of race must be deemed irrational. Our Constitution, to use the apt description of the dissenting Justice in the Plessy case, is color-blind; it neither knows nor tolerates classification on racial grounds."

Plessy was overruled in 1954 when *Brown v. Board of Education (Brown I)* , 347 U.S. 483, 495, declared that "in the field of public education the doctrine of 'separate but equal' has no place," and that by forcing the black plaintiffs to attend separate schools solely because of their race, the respondents denied them equal protection of the laws under the Fourteenth Amendment to the Constitution. In *Brown I*, the Court was considering the complaints of black children that they were discriminated against by being segregated solely because of their race in separate public schools administered by the respondent school authorities under the laws of Kansas, South Carolina, Virginia and Delaware, respectively.

Brown I agreed with Justice Harlan I as to the unconstitutionality of such actions under state laws permitting or mandating them. However, it did not mention the Harlan dissent and tended to focus upon their effect (segregation) rather than the acts of discrimination. *Brown I* was initially

construed as negative in nature, calling only for state neutrality, as explained by Justice Lewis F. Powell, Jr., in his concurrence in *Keyes v. School District No. 1, Denver, Colo.*, (1972) 413 U.S. 189 at 220:

> "It was impermissible under the Constitution for the States, or their instrumentalities to force children to attend segregated schools. The forbidden action was *de jure*, and the opinion in *Brown I* was construed--for some years and by many courts--as requiring only state neutrality, allowing 'freedom of choice' as to schools to be attended so long as the State itself assured that the choice was genuinely free of official restraint."

Justice Powell goes on to say in *Keyes* that the doctrine of *Brown I*, as amplified by *Brown v. Board of Education*, 349 U.S. 294 (1955) *(Brown II)*, did not retain its original meaning:

> "In a series of decisions extending from 1954 to 1971 the concept of state neutrality was transformed into the present constitutional doctrine requiring affirmative state action to desegregate school systems. The keystone case was *Green v. County School Board*, 391 U.S. 430, 437-438... (1968), where school boards were declared to have 'the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" 413 U.S. 220.

Thus, Justice Powell explained, the affirmative-duty concept articulated in a rural setting in *Green* flowered in *Swann v. Charlotte-Mecklenburg Board of Education*, supra, into a new constitutional principle of general application to large urban areas as well.

C. The *Swann* Doctrine Limits Judicially-Ordered Busing

A truism in the American system of justice is that it is delegated to the counsel of the parties the task of shaping the

issues which are brought before the appellate courts. Edward M. Wright, *Witkin on Appellate Court Attorneys*, 54 Cal.St.Bar Journal 106 (1979).

The issues were shaped in *Brown, Green* and *Swann*--relied on for judicially-ordered busing of bystanders--by the counsel for the only parties to those actions, namely, the minority plaintiffs versus the defendant school authorities.

In *Swann*, a desegregation plan had been approved for a large urban district by the District Court in 1965 based on geographic zoning with a free transfer provision, leaving some schools racially imbalanced. 402 U.S. at 6,7 (1971).

After the decisions in *Green* and companion cases, the *Swann* plaintiffs moved in September, 1968, for further relief based on those cases. The District Court then in effect required a plan desegregating all the schools, including the elementary schools, to be accomplished by busing students beyond their neighborhood schools so that the student bodies throughout the system would range from 9% to 38% black. Id. at 7-11.

This Court noted that **all the parties agreed** (emphasis by *Amici)* that "in 1969 the system fell short of achieving the unitary system that those (*Green* and companion) cases require;" but that the board..."reiterated its view that the plan was unreasonable." Id. at 7,11.

Dealing with the facts and issue thus presented to it, this Court stated:

> **"On the facts of this case,** we are unable to conclude that the order of the District Court is not reasonable, feasible and workable..." Emphasis supplied. Id. at 31.

However, the Court also indicated the temporary nature of the judicial role.

> "At some point, these school authorities and others like them should have achieved full compliance with this

Court's decision in *Brown I*. The systems will then be 'unitary' in the sense required by our decisions in *Green* and *Alexander*.

> "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." Id. at 31,32.

When this Court was considering the reasonableness of the *Swann* plan the whites were a majority of 71% in the Charlotte school system. 402 U.S. at 6. In the DCSS black students are an emerging majority, which as reported in the decision below, 887 F.2d at 1441, was 47% of the DCSS population in September, 1986, and reportedly had reached 57% at the time of a report on the case by The Los Angeles Daily Journal on February 20, 1991, p.4.

The absence of "anti-busing" students as parties in *Swann* individually objecting to being racially bused from their neighborhood schools led to a lack of reference to that contention in considering the board's claim the busing plan was unreasonable.

> "An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process... It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more

> than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed." *Swann*, supra, 402 U.S. at 30,31.

By this reference to the children affected by the order, the *Swann* Court indicated that the interests of such students are not precluded from consideration in some appropriate manner.

II. THE PANEL ORDER TO REASSIGN DeKALB COUNTY STUDENTS ON A RACIAL BASIS IS UNCONSTITUTIONAL

The panel relies upon *Swann*, supra. 402 U.S. at 27-28, as its authority for racially reassigning students to "attain racial equality" in the category of student assignments for a period of at least three years. 887 F.2d at 1450.

But *Swann* also held:

> "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils nearest their homes." 402 U.S. at 28.

No constitutional violation by a school board arises when the racial "imbalance" in its district, under the relevant facts and history, is *de facto* in nature, such as that arising from demographic changes not attributable to discriminatory acts by the school board. And, as Justice Powell has described it, the constitutional violation must be clearly determined before remedies, not permitted to exceed the extent of the violation, will be considered. *Regents of University of California v Bakke*, 438 U.S. 265, 300 (1978). The *Swann* Court found a constitutional violation under the facts and history before it. But the facts and history in this case since the June 12, 1969, district court desegregation order do not, in *Amici's* opinion, clearly determine a "constitutional violation." Without it, the panel lacks the necessary basis upon which to rest its order overriding

both the school board and district court, and ordering busing.

The panel order relates the numerous affirmative desegregative actions taken snce 1969 by the school board under the direction of the district court. These included the closing of "all remaining de jure black schools," establishing a neighborhood school attendance policy, and a "M to M program." The latter program permits students to transfer from schools in which their race is a majority to schools in which their race is a minority, which was modified in 1976 to provide those students with free transportation. *Pitts by Pitts,* supra, 887 F.2d at 1443.

The panel order points out that black students constituted 47% of the DCSS population in September, 1986; at which time 50% attended schools with black populations of more than 90%, while 27% of the white students attended schools with white populations of more than 90%. Id. at 1441. It then relates demographic changes in the DCSS occurring after 1969:

> "For example, between 1970 and 1980, north DeKalb County's non-white population increased 102-percent to 15,365. South DeKalb County's non-white population, however, increased 661-percent to 87,583. In addition, between 1975 and 1980, 37,000 white residents moved from south DeKalb County to neighboring counties.
>
> "DeKalb County's demographic changes affected the DCSS. Between 1976-1986, the DCSS elementary school population declined 15-percent. During the same time, however, black elementary student enrollment increased 86-percent. At the high school level, DCSS enrollment declined 16-percent, while black enrollment increased 119-percent." Id. at 1442.

The panel order does not relate any discriminatory actions by the school board after June 12, 1969, causing the racial imbalance in the schools related above. Thus, it may be fairly argued from the facts related in the order that the racial ratios in those schools are due to population changes and not attributable

to relevant actions by the school board.

The panel thus lacks authority, under *Swann*, to order busing in the DCSS where the existing "segregation" of "minority" students, who are becoming a majority group, free to transfer from their neighborhood schools to advance integration, is *de facto* in nature.

A. The Order to Remedy De Facto "Segregation" Violates the Separation of Powers Doctrine.

One of the most quoted sources of the separation of powers design of the Constitution is the 1780 Massachusetts Constitution, which includes this classic command:

> "In the government of this commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them--to the end that it may be a government of laws and not of men."

The reason for the division of the governing powers was stated by James Madison in *The Federalist No. 47,* recently quoted by Justice Powell in concurring in *I.N.S. v. Chadha,* 462 U.S. 919 (1983), in which the doctrine was invoked:

> "The accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Id. at 960.

The nature and extent of the judicial power of the United States, under the proposed Constitution, greatly concerned the Anti-Federalists. A person, calling himself Brutus and thought to have been Robert Yates, in a letter dated January 31, 1788, stated he believed that the powers granted the judicial department "will operate to a total subversion of the state judiciaries, if not, to the legislative authority of the states." He concluded:

> "When the courts will have a precedent before them of a court which extended its jurisdiction in opposition to an act of the legislature, is it not to be expected that they will extend theirs, especially when there is nothing in the constitution expressly against it? and they are authorised to construe its meaning, and are not under any controul?
>
> "This power in the judicial, will enable them to mould the government, into almost any shape they please..." *The American Constitution: For and Against*, J. R. Pole, pp. 58,63, (Hill and Wang, 1987).

Alexander Hamilton conceded in Federalist No. 78 that if the judges "should be disposed to exercise WILL instead of JUDGMENT the consequence would equally be the substitution of their pleasure to that of the legislative body." The Federalist, (B.F.Wright, Ed.1961), p.493. He assured skeptics this would not happen because, under the proposed constitution, the judiciary "has no influence over either the sword of the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment." Id. at 490.

Justice Felix Frankfurter noted the limited extent of federal judicial power, in a concurrence in 1949 in *American Fed. of Labor v. American Sash & Door Co.*, 335 U.S. 538 at 557:

> "(T)he Court is without power to shape measures for dealing with the problems of society but has merely the power of negation over measures shaped by others."

The power of the federal judiciary to negate measures of others, of course, has been exercised by virtue of this Court's holding that the power to interpret the Constitution resides with it. *Marbury v. Madison*, 5 U.S. 137 (1803).

Justice Frankfurter prefaced his above statement by urging restraint in the exercise of that power:

> "In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint... As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace." *American Fed. of Labor*, supra, 335 U.S. at 555-556.

Chief Justice Warren E. Burger reiterated in *Chadha*, supra, 462 U.S. at 951, that "(t)he Constitution sought to divide the delegated powers of the new federal government into three defined categories, Legislative, Executive and Judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." He added that "(t)he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."

This doctrine underlies, *Amici* submit, Chief Justice Burger's statement in *Swann* to the effect that there is no basis for ordering assignment of students on a racial basis to remedy *de facto* "segregation." Thus, the panel exceeds the outer limits of its power in ordering busing to remedy what, under the relevant facts and history, is at most *de facto* "segregation" in DeKalb County public schools.

B. The Order Subjects Adversely-Affected Students to Loss of Their Constitutional Rights in Violation of the Due Process Clause

In concluding that the DCSS "failed to fulfill its constitutional duties regarding student assignment," the panel makes an order which will require extensive mandatory busing. It concedes that to comply, "the DCSS's actions may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some." *Pitts by Pitts*, supra, 887 F.2d at 1450.

Notwithstanding findings of the District Court, the

position of the DCSS and, by implication, the position of plaintiffs regarding neighborhood schools, the panel orders that "(t)he DCSS and the district court must consider busing--regardless of whether the plaintiffs support such a proposal. The DCSS's neighborhood plan is not inviolable." Id. at 1450.

This order implies, supported by the demographics cited in the record, that many DCSS students, including some "minority" students, support a neighborhood plan. Notwithstanding, these students are to be subjected to assignment on a racial basis to maintain unspecified racial ratios in DCSS schools for at least three years. And busing may be extended as long thereafter as it takes the DCSS to satisfy the appellate panel that the student assignment category and five other categories in the system have achieved "unitary" status. Id. at 1449,50.

This extension of power of the panel over DCSS schools verifies the concern which Chief Justice (then-Justice) William H. Rehnquist expressed in dissent in *Keyes,* supra, 413 U.S. at 189:

> "The drastic extension of *Brown* which *Green* represented was barely, if at all, explicated in the latter opinion."

One of the implications which could have been considered at the time was that the introduction of judicial affirmative action would give the federal judiciary power of a legislative nature over the operation of schools. Less foreseeable was the extent to which this power would be exercised, and the extent to which limitations should be placed upon it. For *Green* suggested, in Footnote 6, only a modest use of affirmative action as to the assignment of students, namely, that a unitary, non-racial system could be readily achieved by geographic zoning. In other words, it suggested the assignment of students to their neighborhood schoools. *Green,* supra, 391 U.S. at 442.

By analogy, soon-to-become-Justice Robert H. Jackson, in *The Struggle for Judicial Supremacy* (Knopf, 1941), illustrated how New Deal legislation was endangered by the

device of lawsuits testing the constitutionality of laws without the presence of real parties in interest. He pointed out that this was later remedied by the Judiciary Act of August 24, 1937, which assured participation by the real parties in interest in specially constituted forums for such litigation. Pp. 118-123.

It was during that period that Chief Justice (then-Justice) Harlan F. Stone cautioned in dissent in *United States v. Butler,* 297 U.S. 1,78-79 (1936):

> "(W)hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."

As Justice Powell concluded in Footnote 7 to his concurring opinion in *Austin Independent School District v. United States,* 429 U.S. 990, at 995 (1976):

> "(A) desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offending action but, rather upon innocent children and parents."

The innocent students in DeKalb County to be subjected to racial assignment away from their neighborhood schools without their consent or that of their parents, then, are bearing the "burden on some" referred to in the panel order.

Their interests coming into play at this point include (1) not being racially discriminated against in the course of required attendance in the DCSS public schools, and (2) not suffering deprivation of liberty by reason of that order. Indicative of their importance are the following events. As to the first, this Court has declared there is a national policy against racial discrimination in education. *Bob Jones University,* supra, 461 U.S. at 593. See *Bolling v. Sharpe,* 347 U.S. 497 (1954). As to the second, Justice Powell stated, in concurring, in *Keyes,* supra, 413 U.S. at 247:

> "Any child, white or black, who is compelled to leave his neighborhood and spend significant time each day being

transported to a distant school suffers an impairment of his liberty and privacy."

Their interests compare favoral ly in their substantiality with those of the nine Ohio high school students facing suspension for as short as one day and not more then ten days. There, this Court held that due process under the Fourteenth Amendment required at a minimum that they be given some kind of notice and some kind of a hearing before action by school officials to suspend them. *Goss v. Lopez,* 419 U.S. 565 (1975).

The panel order, then, is defective in that it requires the district court to make the DCSS prepare and file a plan in accordance with an opinion which treats the students affected as "elements" rather than persons. It is also defective because of the narrow scope of the evidence which the trial judge may receive to be "in accordance with this opinion." *Pitts by Pitts,* supra, 887 F.2d at 1450-1451.

Chief Justice (then-Justice) Rehnquist described a similar situation in his order denying the request of the school board for a stay of a "busing" order in *Board of Ed., Etc. v. Superior Court of Cal.* (1980) 448 U.S. 1343 at 1348:

> "...The Board's primary contention here is that 'white flight,' which all parties concede has taken place in the school district, will accelerate if this plan is put into effect... Because projections indicated that the school district in 1987 will consist of only 14% white students, the Superior Court asserted that its task was to achieve the optimal use of white students in the schools so that the maximum numbers of schools may be desegregated.
>
> "I find this analysis somewhat troublesome, since it puts 'white' students much in the position of textbooks, visual aids, and the like--an element that every good school should have. And it appears clear that this Court, sooner or later, will have to confront the issue of 'white flight' by whatever term it is denominated..."

The interests of the adversely-affected students, as real parties in interest, can be properly raised only by separate representation in their behalf. *Johnson v. San Francisco Unified School District* (9th Cir. 1974), 500 F.2d 349, 353. If there is a remand, they should be allowed to intervene. Rule 24(a)(2), F.R.Civ.Proc. *Martin v. Wilks,* 109 S.Ct. 2180,2185 (1989). In view of their inability to retain an attorney, an attorney or an *amicus* should be appointed for them. Compare *Bob Jones University v. United States,* 456 U.S. 922 (1982).

The rights of these innocent students should be considered vis-a-vis those of the respondents upon the facts in this case, and not the facts in the cases where minority students were just emerging from the rigid racial separation of the past. Compare *Bakke,* supra, 438 U.S. at 298. For example, the word "segregation" (where persons classified as "minorities" may freely transfer) should not be given the same breadth here as in those earlier cases.

The legislative nature of the order requires that students just now adversely affected be given the same latitude in the presentation of evidence in opposition to it as they would have under the democratic procedures guiding a school board, including evidence of "white flight." See *A Scholar Who Inspired It Says Busing Backfired,* an interview with Dr. James A. Coleman, the senior author of the 1966 *Equality of Educational Opportunity Survey.* The National Observer, June 27, 1975, p.1.

In the mandate's present form, the trial court is bound to fashion a plan so difficult to comply with as to "condemn a school district once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future." *Board of Education of Oklahoma City Public Schools v. Dowell,* 111 S.Ct. 630, 638 (1991). And during that period innocent, adversely-affected students are to be subjected to loss of their constitutional rights, in violation of the Due Process Clause of the Fifth Amendment to the Constitution.

CONCLUSION

For the reasons stated above, the Intervenors opposed to judicially ordered assignment of students on a racial basis in *Carlin v. Board of Education, San Diego Unified School District,* as *amici curiae*, respectfully request this Court to reverse the Court of Appeals' ruling.

Respectfully submitted,

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Dated: April 29, 1991

APPENDIX

APPENDIX A

STUDENTS

(Child, living in District, subject to busing, who can read and understand the statement below

TO THE BOARD OF EDUCATION, SAN DIEGO UNIFIED SCHOOL DISTRICT:

I, the undersigned child, residing in the San Diego Unified School District, respectfully object to school authorities making me, because of my race, go away from my neighborhood public school location to classes, without my consent and the consent of my parent(s), as a violation of my rights.

NAME	AGE	ADDRESS	DATE
Lisa C	12	[illegible]	19, 1981
Angie C	10	[illegible]	Feb 19, 198
Cheryl L	11	[illegible]	Feb 19, 81
Erin C	11	[illegible]	Feb 19, 8
Karen	11	[illegible]	Feb 20, 8
Sandy	11	[illegible]	Feb 20, 8
Brent	11	[illegible]	Feb 20, 81
Stephan		[illegible]	Feb 20, 81
Ricky G	12	[illegible]	Feb 23, 8
Krista F	11	[illegible]	Feb 23, 8
Jerri	11	[illegible]	Feb 23, 19
Lori	11	[illegible]	Feb 23, 81
Cheryl [illegible]	12	[illegible]	Feb 23, 8

(Excerpt, L. Lester Declaration, Intervenors' Ex. 6 Id., Carlin, 7/16/8

BEST AVAILABLE COPY

APPENDIX B

Carlin v. Board of Education, No. 303,800, Superior Court, San Diego County, California; Honorable Louis M. Welsh, Presiding

Excerpt from Declaration of Larry K. Lester, marked Intervenors' Exhibit 6 for Identification at hearing on July 16, 1981.

. . ."11. On October 21, 1980, an elementary exchange program was proposed to the Board of Education of the SDUSD whch I am informed and believe and therefore allege calls for forced busing of elementary school children in said district. Thereafter, I and about 40 other members of Groundswell circulated petitions among residents of the SDUSD in the following three categories: (1) taxpayers-parents, (2) students, and (3) taxpayers-voters.

"12. On March 3, 1981, I presented to the SDUSD Board a number of petitions bearing approximately 5983 signatures, including signatures in each of the above three categories, with the attached memorandum of transmittal ('respectfully object(ing) to the mandatory assignment of children, because of their race, away from their neighborhood public school location in the San Diego Unified School District...')". . . .

Excerpt from Reporter's Transcript of Proceedings, July 16, 1981

. . ."MR. ENSTROM (counsel for Intervenors) (p.190 l.13): The number of students signing those petitions was 1,856. And the original petitions have been filed with the School District.

THE COURT: Will counsel stipulate, if called he (Mr. Lester) would so testify?

MR. STERN (counsel for Defendant): Yes, your Honor.

MRS. ROESER (counsel for Plaintiffs): So stipulated.

THE COURT: I don't think it will be necessary for Mr. Lester to testify, because they have stipulated if called he would so testify. The question before me really is the relevancy of any or all of these documents. And I would like to go through them with you and make rulings.

. . . THE COURT (p.197 l.10): (Exhibit) Six is the declaration from Mr. Lester, which I have read. I read it in the copies you handed to me the other day.

MR. ENSTROM: Very good, your Honor.

THE COURT: And I will sustain the objection there, too, on the ground it is irrelevant.

. . . MR. ENSTROM (p.197 l.20): But it is offered for a number of different purposes, your Honor.

THE COURT: If you wish to speak further to it, I of course will listen to you.

. . . MR. ENSTROM: (p.199 l.16): Yes, your Honor. Of course, I am urging that in these cases where the Court assumes a legislative role, there is a great deal more latitude as to what your Honor is required to consider in all of these matters. In other words, certainly a legislative committee which would consider these matters - -

THE COURT: Especially one that wanted to be returned to office.

MR. ENSTROM: My point is, where the Court assumes a legislative role, along with that goes greater latitude as to what evidence you want to receive.

THE COURT: You know, Mr. Enstrom, judges are never consistent. You know that. I sustain the objection.

MR. ENSTROM (p.200 l.1): Number 12, the allegation of course is the presentation to the Board of these 5,900-plus signatures, which goes to show again this long, deep, and continuing opposition to forced busing as it bears on white flight.

THE COURT: Just a moment. Yes, go ahead.

MR. ENSTROM: Number 12, that bears on white flight, particularly. When I refer to white flight, I am talking about the issues of objectors leaving the school system, which has been a matter about which evidence has been received. And I don't think it is necessarily referring to any particular race.

THE COURT: No.

. . . THE COURT (p.200 l.20): Still, I will sustain the declaration of Mr. Lester.

. . . MRS. ROESER (p.200 l.24): Your Honor, you sustained the objection? The Court said 'sustain the declaration.'

THE COURT: I am sorry, I misstated myself. I sustain the objection to the declaration."

. . . .